



April 6, 1999

Ms. Elaine S. Hengen
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR99-0910

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123196.

The City of El Paso (the "city") received two requests for information. One request is for information relating to the investigation of allegations made to the media in anonymous letters in 1997, and the other is for information relating to any investigation of Sergeant Angela Sommers. You inform us that there were two separate investigations of the allegations made anonymously to the media. You have submitted documents from these two investigations: exhibit C, a special investigation authorized by the Chief of Police, and exhibit D, a sexual harassment investigation file. A portion of exhibit C is responsive to the request for information about Sergeant Sommers. You contend that exhibits C and D are excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

First, we address the issue of whether you met your statutory deadline for requesting a decision on the disclosure of information relating to Sergeant Sommers. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. Having considered your arguments and the circumstances surrounding the request for information, we conclude that you did not timely seek a decision from this office regarding the request for information about the investigation of Sergeant Sommers. When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information

is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.,* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). You claim that the information in exhibit C relating to Sergeant Sommers is excepted from disclosure under section 552.103. However, you waived your section 552.103 claim by failing to timely raise it. *See* Open Records Decision No. 551 (1990) (section 552.103 is discretionary), 473 (1987) (governmental body waives protection of section 552.103 by failing to timely claim it). Therefore, we conclude that you must publicly disclose the information relating to Sergeant Sommers.

All of exhibit D and portions of exhibit C relate to a sexual harassment investigation. You contend that these documents are excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy. Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. The common-law right of privacy is incorporated into the Open Records Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Found. v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the right of common-law privacy to the files of a sexual harassment investigation. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

According to *Ellen*, the public has a legitimate interest in documents that adequately summarize sexual harassment allegations and the results of investigations into those allegations, but not in the identities or detailed statements of the victims and witnesses. *See id.; see also* Open Records Decision Nos. 473 (1987), 470 (1987) (public has legitimate interest in job performance of public employees). In this case, we conclude that the common-law right of privacy protects the names of the victims and witnesses involved in the

investigation of the sexual harassment allegation. We have not marked the names of the victims and witnesses, but you should redact these names prior to releasing information from exhibits C and D. We find that exhibit C and the first ten pages of exhibit D adequately summarize the sexual harassment investigation. Therefore, you should withhold the remainder of exhibit D, which consists of detailed statements and investigation notes, from disclosure based on the common-law right to privacy.¹ We have also marked some additional information in exhibit C that is protected by the common-law right to privacy.

Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” You have explained how releasing some of the information in exhibits C and D will interfere with the city’s ongoing law enforcement efforts. For this reason, we conclude that the city may withhold the marked information in exhibits C and D from disclosure pursuant to section 552.108.

Exhibits C and D contain information that is excepted from disclosure under section 552.117(2), which protects the following information about peace officers: their home addresses, home telephone numbers, social security numbers, and information that reveals whether they have family members. We have marked the information that is excepted from disclosure under section 552.117(2). The city must withhold this marked information from disclosure.

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked some information in exhibit C that falls within the scope of section 552.130. The city must withhold this marked information from disclosure.

Finally, we note that one of the requestors has a special right of access to some of the information excepted from disclosure under sections 552.101 and 552.117. *See* Gov’t Code

¹Because we conclude that pages eleven through eighty-one of exhibit D are excepted from disclosure pursuant to section 552.101, we do not address your additional arguments against the disclosure of this information.

§ 552.023 (person has special right of access, beyond right of general public, to information excepted from disclosure by laws intended to protect that person's privacy interests). Therefore, the city should not redact this requestor's name, address, telephone number, or family member information from the copies of documents it releases to this requestor.

To summarize, section 552.103 does not except any of the requested information from disclosure. Section 552.101, in conjunction with the common-law right to privacy, excepts from disclosure pages eleven through eighty-one of exhibit D, the names of the victims and witnesses involved in the sexual harassment investigation, and the marked information in exhibit C. We have marked information that is excepted from disclosure pursuant to sections 552.108, 552.117, and 552.130.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 123196

Enclosures: Marked documents

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